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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Yolo)**

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THE PEOPLE,

Plaintiff and Respondent,

v.

KENNETH ALLEN CHATOFF,

Defendant and Appellant.

C059713

(Super. Ct. No. 07-5189)

Defendant Kenneth Allen Chatoff pleaded no contest to possession of cocaine (Health & Saf. Code, § 11350, subd. (a)), and admitted that he had previously served a prison term (Pen. Code, § 667.5, subd. (b)). The Yolo County Superior Court suspended imposition of sentence and placed defendant on probation under Proposition 36. (Pen. Code, § 1210.1.)

Roughly a month later, while in Placer County, defendant violated his grant of probation by committing the crimes of burglary (Pen. Code, § 459) and petty theft with a prior (*id.*, §§ 484, subd. (a), 666). Defendant was subsequently convicted and sentenced by the Placer County Superior Court to a state prison term of two years four months (concurrent lower terms of

16 months for each conviction, plus an additional year for a prison-prior enhancement).

Finding the Placer County conviction to be a violation of defendant's grant of probation under Proposition 36, the Yolo County Superior Court imposed a consecutive eight-month prison term (one-third the middle term of two years on the possession of cocaine), and imposed other orders.

On appeal, defendant contends the Yolo County Superior Court abused its discretion by failing to consider the criteria enumerated in rule 4.425 of the California Rules of Court<sup>1</sup> in deciding to impose a consecutive rather than a concurrent sentence, and by failing to state its reasons for imposing a consecutive sentence in this case. We shall affirm the judgment.

### **PROCEDURAL BACKGROUND**

We dispense with a recitation of the facts as they are unnecessary to the resolution of this appeal. We do, however, provide a detailed recitation of the argument of counsel at the sentencing hearing, as well as the trial court's ruling with respect to imposing a consecutive eight-month sentence on the possession of cocaine conviction.

At the sentencing hearing, the trial court first explained that it was in possession of a supplemental probation report

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<sup>1</sup> References to rules are to the California Rules of Court.

prepared by Deputy Probation Officer R.G. Partlow, and that the court and attorneys had spoken with Officer Partlow during a conference call. The court then summarized the content of the call with respect to the issue of consecutive sentencing: "The People urge the Court to impose a sentence which would be consecutive, and that was probation's feeling as well, *because it is a separate offense, separate and apart from the offenses to form the basis of [defendant's] Placer County sentence.* [¶] Probation points out that in many courts, absent something to the contrary, it would be made concurrent, and that appears to be the default position." (Italics added.) The court then described the remainder of the conference call, and asked defendant's trial counsel if the court had missed anything. Defense counsel answered: "No, Your Honor, I believe you laid out all the arguments that were made."

The prosecutor then addressed the court concerning the issue of consecutive sentencing: "If I may, reading rule 4.425, criteria affecting concurrent or consecutive sentencing. [¶] . . . [¶] [T]he facts relating to the crimes include whether or not the crimes and their objectives were predominantly independent of each other. We have crimes in Placer County completely separate from this, separated by not only time but space and by intent. The current case before the Court is a drug possession offense. The crimes in Placer County were theft-related offenses. The intent required for the drug offense is simple knowledge that the drug was there. The intent

required for the burglaries was intent to permanently deprive somebody of an item or entering into a building with the intent to commit theft. They are not only predominantly, but completely independent of each other. [¶] [Rule 4.425(a)(2)] doesn't apply as neither of these crimes, as far as I know, involve violence; and [rule 4.425(a)(3)], the crimes were committed at different times or separate places rather than being so close in time and place as to indicate a single period of abhorrent [sic] behavior. There is not a single period of abhorrent [sic] behavior here. They are simply not the same crime. They are separated by time and space. There is no rationale I see in rule 4.425 that would allow for [a] concurrent sentence here. This is two different crimes, two different times in two different counties and should be punished as such."

The following exchange then occurred between the trial court and defense counsel:

"THE COURT: [Defense counsel], isn't [the prosecutor] correct, that the Rules of Court suggest that other than reducing his overall sentence, that I should be sentencing him consecutive?

"[DEFENSE COUNSEL]: Well, Your Honor, what [the prosecutor] is citing is a guideline.

"THE COURT: *These are the Rules of Court. They're more than the guideline.*

"[DEFENSE COUNSEL]: It is something to be considered. I believe the Court has discretion when it comes to the overall sentence. In this case, as [Officer] Partlow wrote in the probation report, it is a relatively small amount.

"THE COURT: But [Officer] Partlow recommended consecutive." (Italics added.)

Defense counsel then represented to the court that he had spoken to Officer Partlow, and that, notwithstanding the conference call during which he advocated a consecutive sentence, Partlow stated that he would not oppose a concurrent sentence. The trial court responded: "But I'm left with--my job is to sort of follow the policy that's set forth and conceptually, which means that people are punished for what they do, and that we don't give a volume discount other than what is accomplished by, you know, one-third the middle base kind of thing. You don't sentence him to staggering terms, you do sentence him to something reflecting an additional, separate crime."

Provided another chance to convince the court to sentence defendant to a concurrent term, defense counsel argued: "Small amount of drugs, very cooperative, and he did a parole violation for the same amount of drugs, and he's not getting credits for that time."

After explaining that it was "prepared to follow probation's recommendation," the trial court affirmed the sentence of two years four months on the Placer County

convictions, imposed a consecutive sentence of eight months on the possession of cocaine conviction, and imposed other orders.

## DISCUSSION

### I

Defendant's first contention, that the trial court failed to consider the criteria enumerated in rule 4.425, borders on the frivolous. Relevant criteria enumerated in the Rules of Court "must be considered by the sentencing judge, and *will be deemed to have been considered unless the record affirmatively reflects otherwise.*" (Rule 4.409, italics added.) Here, the record affirmatively reflects that the trial court considered the relevant criteria enumerated in rule 4.425.<sup>2</sup> Indeed, after

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<sup>2</sup> In its entirety, rule 4.425 provides:

"Criteria affecting the decision to impose consecutive rather than concurrent sentences include:

"(a) Criteria relating to crimes--

"Facts relating to the crimes, including whether or not:

"(1) The crimes and their objectives were predominantly independent of each other;

"(2) The crimes involved separate acts of violence or threats of violence; or

"(3) The crimes were committed at different times or separate places, rather than being committed so closely in time and place as to indicate a single period of aberrant behavior.

"(b) Other criteria and limitations--

"Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except:

"(1) A fact used to impose the upper term;

"(2) A fact used to otherwise enhance the defendant's prison sentence; and

listening to the prosecutor argue the relevant criteria enumerated in rule 4.425, specifically, that the crimes and their objectives were predominantly independent of each other, and committed at different times and separate places so as not to indicate a single period of aberrant behavior, the court challenged defense counsel to explain why the prosecutor was wrong that the rules suggested a consecutive term would be appropriate. When defense counsel responded by arguing that rule 4.425 was merely a guideline, the court replied: "*These are the Rules of Court. They're more than the guideline.*" (Italics added.)

Defendant's position, that the trial court could listen to the prosecutor's argument directed specifically to the relevant criteria enumerated in rule 4.425, indicate agreement with the prosecutor's position and ask defense counsel to respond to the points raised, express a great deal of regard for the rules, and yet somehow fail to consider the very criteria argued moments earlier by the prosecutor, simply defies reason.

Nor did the trial court, as defendant asserts, inappropriately focus "on whether other courts were in the practice of imposing concurrent terms." As explained above, the record reveals that the trial court appropriately focused its inquiry on the criteria enumerated in rule 4.425. Defendant attempts to rebut this by divorcing a statement made by the

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"(3) A fact that is an element of the crime may not be used to impose consecutive sentences."

trial court, i.e., that its "job is to sort of follow the policy that's set forth [in rule 4.425] . . . , which means that people are punished for what they do, and that we don't give a volume discount other than what is accomplished by, you know, one-third the middle base kind of thing," from its surroundings. This statement comes immediately after the prosecution argued that the crimes and their objectives were predominantly independent of each other, and committed at different times and separate places so as not to indicate a single period of aberrant behavior, and after the court expressed agreement with the prosecution's position and explained to defense counsel that the rules are not mere guidelines.

In this context, the statement can be understood as merely expressing the court's view that, where the criteria under rule 4.425 indicate that "an additional, separate crime" was committed by defendant, and the defense cites no criteria pointing the other direction, a consecutive one-third the middle term sentence would be appropriate. This reading of the statement is confirmed by the fact that the court immediately provided defense counsel with another opportunity to argue any mitigating circumstances believed to weigh in favor of a concurrent sentence. Accordingly, in its proper context, the trial court's statement does not indicate that it ignored the relevant criteria under rule 4.425.

We find the trial court appropriately considered the relevant criteria enumerated in rule 4.425 in choosing to



sentence defendant to a consecutive sentence of eight months on the possession of cocaine conviction.

## II

Defendant's second contention, that the trial court failed to state its reasons for imposing a consecutive sentence in this case, has been forfeited by his failure to object below.

The California Supreme Court has stated: "In order to encourage prompt detection and correction of error, and to reduce the number of unnecessary appellate claims, reviewing courts have *required* parties to raise certain issues at the time of sentencing. In such cases, lack of a timely and meaningful objection forfeits or waives the claim." (*People v. Scott* (1994) 9 Cal.4th 331, 351, citing *People v. Walker* (1991) 54 Cal.3d 1013, 1023 ["The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had"]; *People v. Saunders* (1993) 5 Cal.4th 580, 589-590; see also *In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2 [stating that the correct legal term for loss of a right based on failure to assert it in a timely fashion is "forfeiture," not "waiver"].) This forfeiture doctrine applies to "claims involving the trial court's failure to properly make or articulate its discretionary sentencing choices." (*Scott, supra*, 9 Cal.4th at p. 353.) As the Supreme Court explained: "Our reasoning is practical and straightforward. Although the court is required to impose sentence in a lawful manner, counsel

is charged with understanding, advocating, and clarifying permissible sentencing choices at the hearing. Routine defects in the court's statement of reasons are easily prevented and corrected if called to the court's attention." (*Ibid.*)

In this case, while the trial court manifestly considered the criteria enumerated in rule 4.425 in choosing to impose a consecutive sentence, and indicated its agreement with the reasons stated by the prosecutor, it did not separately state those reasons on the record at the sentencing hearing. (Pen. Code, § 1170, subd. (c) [requiring the trial court to state the reasons for its sentencing choice on the record at the time of sentencing]; *People v. May* (1990) 221 Cal.App.3d 836, 838 ["The imposition of a consecutive sentence is a sentence choice"].) However, as defendant made no objection when the trial court failed to state reasons for imposing a consecutive sentence, he has forfeited this claim of error. (See *People v. Velasquez* (2007) 152 Cal.App.4th 1503, 1511-1512.)

#### **DISPOSITION**

The judgment is affirmed.

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BUTZ, J.

We concur:

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BLEASE, Acting P. J.

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NICHOLSON, J.